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In The

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, JAMES M. STROCK, SECRETARY OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, DOUGLAS P. WHEELER, SECRETARY OF THE CALIFORNIA RESOURCES AGENCY ON THE MERITS IN SUPPORT OF TAHOE REGIONAL PLANNING AGENCY

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Amici respectfully files this brief in support of respondent, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

California's interest in this case is multifaceted, and can be summarized as follows:

1. Lake Tahoe is a national treasure which, by fortunate geographic accident, happens to be located within the borders of California and its sister State of Nevada. While Congress has recognized Lake Tahoe's unique values and taken several steps toward its preservation, principal responsibility for this natural resource lies with those two states and the bistate agency they have created, the Tahoe Regional Planning Agency (TRPA).

California entered into the bistate Tahoe Regional Planning Compact with Nevada in 1968, and amended that Compact in 1980, for the express purpose of addressing Lake Tahoe's undisputed environmental decline. Through the Compact, ratified by the Congress, California committed itself to an interstate program of cooperative regional planning for the Lake Tahoe Basin. Over the past decade, moreover, California taxpayers have spent over $100 million in an effort to halt and reverse the environmental deterioration of the Lake Tahoe Basin. The State of California thus has an important stake in guaranteeing the continued viability of this unique and irreplaceable resource, and in furthering the Compact's vital objectives.

2. While not a party in the *Suitum* case, California is currently defending litigation – both in the Lake Tahoe Basin and elsewhere – in which identical legal issues are

being advanced.[1] The Court's decision in the present case thus has the potential to directly affect pending litigation to which California is a party. Accordingly, California has a major interest in insuring that its legal and policy views are presented to the Court.

3. California's current population of over 32 million people – as compared to approximately 20 million in 1970 – is expected to exceed 36 million residents by the end of the century. (California Department of Finance, *Population Estimates for California Cities and Counties* (1996); California Department of Finance, *Projected Total Population of California Counties*, 1990-2005 (1991).)

At the same time, California possesses a finite amount of land for its citizens to inhabit, and a wide array of unique natural and cultural resources. As Justice Oliver Wendell Holmes sagely observed nearly a century ago, the public interest in its natural resources is "omnipresent wherever there is a State, and grows more pressing as population grows."(*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).) Justice Holmes' admonition applies with particular force to California, its 58 counties and nearly 500 cities, which are struggling to balance the economic needs of their citizens against their fiduciary and sovereign obligation to preserve California's natural and cultural resources for future generations.

In recent years, California's state and local governments have embarked upon a series of important initiatives designed to strike that balance in an appropriate and equitable manner. These measures, which include a

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[1] See, e.g., Tahoe Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency, et al., Case Nos. CIV-N-84-257-ECR, CIV-N-92-98-ECR (D. Nev.) (regulatory takings litigation brought by Lake Tahoe property owners against TRPA, California and Nevada challenging TRPA's 1987 Regional Plan).

wide array of transfer of development rights (TDR) programs, conservation banking concepts, and Natural Communities Conservation Planning (NCCP) initiatives, are described in more detail below. A common theme of these programs, however, is that they are designed to help California and its political subdivisions shape development patterns in a manner not possible solely through traditional forms of regulation. As a result, market incentives have been introduced into California's resource management process, thereby allowing property owners to benefit from greater flexibility and enhanced economic values. These California programs simultaneously promote important community objectives by avoiding land use conflicts and furthering key natural resource objectives.

An adverse ruling in this case on the ability to use TDRs and other market tools could seriously undermine these nationally-recognized efforts by California and its political subdivisions to incorporate increased flexibility into their regulatory programs, while at the same time providing long-term preservation of California's exceptional environment and cultural resources.

Adoption of petitioner's sweeping reformulation of takings jurisprudence – that the Constitution requires that each and every discrete parcel of private property be allowed to be developed – is at fundamental variance with these important California initiatives. Fortunately, such a result is neither consistent with public policy nor faithful to applicable legal principles.

SUMMARY OF ARGUMENT

ARGUMENT

The parties and their respective *amici* have thoroughly examined the question of ripeness and the manner in which that procedural doctrine applies to the present litigation. California will therefore not address

that issue, focusing its attention instead on distinct legal and policy questions raised by this important case.

I.

LAKE TAHOE IS A UNIQUE AND FRAGILE PUBLIC RESOURCE, THE ENVIRONMENTAL AND ECONOMIC VIABILITY OF WHICH IS DIRECTLY THREATENED BY ILL-CONSIDERED DEVELOPMENT OF FRAGILE LANDS IN THE TAHOE BASIN.

A. The Unique Nature of Lake Tahoe.

Lake Tahoe is an exceptionally pure and beautiful natural resource, the crown jewel of the Sierra Nevada mountain range. An early visitor to Tahoe, Mark Twain, described the lake as:

> "a noble sheet of blue water lifted six thousand three hundred feet above the level of the sea . . . with the shadows of the mountains brilliantly photographed upon its still surface . . . the fairest picture the whole earth affords." (*Roughing It* [Harper & Roe], at p. 156.)[2]

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[2] Elsewhere, Mark Twain describes the waters of Italy's famous Lake Como as "a bedizened little courtier" compared to Lake Tahoe:

> "It certainly is clearer than a great many lakes, but how dull its waters are compared with the wonderful transparence of Lake Tahoe! . . . . People talk of the transparent waters of the Mexican Bay of Acapulco, but in my own experience they can not compare with those I am speaking of. I have fished for trout in Tahoe, and at a measured depth of eighty-four feet I have seen them put their noses to the bait and I could see their gills open and shut. I could hardly have seen the trout themselves at that distance in the open air. . . . " (*The Innocents Abroad* [1966 Signet Classic edition], at p. 146.)

The United States Senate more recently depicted Lake Tahoe as:

> "famed for its scenic beauty and pristine clarity. . . . Only two other sizable lakes in the world are of comparable quality – Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union." (S. Rep. 91-510, 91st Cong., 1st Sess., pp. 3 and 4 (1969).)

State courts and legislatures have come to similar conclusions. The Supreme Court of California, for example, characterized the Lake Tahoe Basin as "an area of unique and unsurpassed beauty. . . . " (*People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 485, 96 Cal.Rptr. 553, 487 P.2d 1193 (1971).) The Supreme Court of Nevada recently explained that Lake Tahoe's waters are "extremely clear," and characterized the lake as "a national treasure." (*Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 641, 649, 855 P.2d 1027 (1993), *cert. denied*, 510 U.S. 1041 (1994).) In adopting the 1980 Tahoe Regional Planning Compact, the California and Nevada legislatures found that "The region exhibits unique environmental and ecological values which are irreplaceable." (Pub.L. No.96-551, 94 Stat. 3233 (1980).)

B. Development of Environmentally Sensitive Lands is Steadily Polluting Lake Tahoe.

Lake Tahoe's allure, however, may ultimately be the source of its demise. Pollution caused by poorly-directed development is causing the lake to lose its world-renown clarity. Reviewing the relevant evidence, for example, the Supreme Court of Nevada concluded that the lake's visibility is declining by almost half a meter per year due, in large part, to uncontrolled development. (*Kelly, supra*, 109 Nev. at 641, 644.) The U.S. Court of Appeals for the Ninth Circuit likewise found that the lake's water quality is deteriorating at an "alarming rate" (*People of California v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1316 (CA9

1985).) And a California appellate court concluded that uncontrolled development such as that proposed by petitioners threatens to turn "the lake from clear blue to turbid brown." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, 210 Cal.App.3d 1421, 1425, 259 Cal.Rptr. 132 (1989).) The federally-approved California/Nevada water quality management plan reported that the lake's clarity decreased by 20% from 1962 to 1988. (1988 Water Quality Management Plan for the Lake Tahoe Region, Volume I, at p. 72 ["Water Quality Plan"].) That plan was prepared and adopted by TRPA, certified by California and Nevada, and approved by the federal Environmental Protection Agency pursuant to section 208 of the federal Clean Water Act. (33 U.S.C. § 1288.)

The loss of Lake Tahoe's water quality is caused by two factors: inflows of polluting nutrients and sediments, and the lake's virtually permanent retention of these pollutants. The nutrients (primarily nitrogen and phosphorus – see *Water Quality Plan* at p. 74) cause algae to grow, while sediments both contain algae-feeding nutrients and cause turbidity. (See *Water Quality Plan* at pp. 8-88, *Tahoe-Sierra Preservation Council, supra*, 210 Cal.App.3d at 1427-1429; and *Kelly, supra*, 109 Nev. at 641 for more detailed descriptions of this process.) Although nutrients and sediments occur naturally, absent development virtually none would enter the lake. (*Water Quality Plan* at p. 63; *Kelly* at 641.) This is due, in significant part, to the natural treatment capacity of stream environment zones. (*Water Quality Plan* at pp. 60, 64 and 94.) Scientific studies have found, for example, that these wetlands remove almost 75 percent of dissolved nitrogen, 86 percent of dissolved phosphates, and 94 percent of sediments which enter the wetlands. (*Id.* at p. 60.) Development of these fragile areas, however, destroys their purifying properties. (*Ibid*; *Tahoe-Sierra Preservation Council, supra*, 210 Cal.App.3d at 1427-1428.)

Moreover, unlike most lakes, which can self-purify as fresh water flows in and contaminated water flows out,

the amount of water which enters and leaves Lake Tahoe is minuscule. If the lake were drained, it would take approximately 700 years to be refilled. (See Ayer, "Water Quality Control at Lake Tahoe," 1 Ecology Law Quarterly 3, 8 (1971).) The 1988 Water Quality Plan thus concludes that "[a]s a reasonable rule of thumb, one may employ the approximation that sediments and nutrients discharged to Lake Tahoe remain there forever, either suspended in the water column or settled on the bottom." (*Water Quality Plan* at p. 74.)

The pollution of this exceptional lake harms California by threatening both the region's beauty and its economy. It also directly impairs the State's sovereign interests, since California owns the two-thirds of the lakebed, together with the waters which lie within the state. (*Fogerty v. State of California*, 187 Cal.App.3d 224, 232, fn. 3, 231 Cal.Rptr. 810 (1986), *cert. denied*, 484 U.S. 821 (1987) [lakebed]; California Water Code § 102 [waters]; *Water Quality Plan* at p. 8 [approximately two-thirds of Lake Tahoe located within California].)

C. California Has Undertaken a Number of Important Fiscal and Regulatory Steps to Halt and Reverse the Continuing Pollution of Lake Tahoe.

Alarmed by the permanent loss of its invaluable resources, California spent or authorized for expenditure well over $100 million (not including overhead costs) from 1985 through mid-1996 for land acquisition, site improvements, and other capital projects designed to protect the waters of Lake Tahoe from further degradation and to help restore watersheds on the California side of the Tahoe Basin. Considerably more than $40 million of this total was for soil erosion control and water quality projects, including construction of infrastructure, revegetation, and various other site improvements, as well as public acquisition of easements and other interests in land. Almost $68 million was spent or allocated to acquire environmentally sensitive lands on the California

side of the basin – lands which, if developed, would have caused increased erosion and degradation of the waters of the lake. California spent over $5 million for other resource protection and management programs and projects intended to benefit the water quality of Lake Tahoe. Within the latter category is the California Tahoe Conservancy's "Land Coverage and Marketable Rights Program" (described in greater detail below), under which California purchases parcels of land in urgent need of preservation, and restricts them from future development, thereby generating ground coverage and other marketable rights for sale to permit applicants. And in November 1996, California voters approved the expenditure of an additional $10 million for land purchases and restoration to improve Lake Tahoe's water quality.

These expenditures, while massive, are nonetheless insufficient to fully remedy the environmental problems currently facing Lake Tahoe. Public agencies must also "regulate the uncontrolled development that would likely ensure the permanent loss of Lake Tahoe to eutrophication in the near future . . . " (*Kelly, supra*, 109 Nev. at 644.) The problem is exacerbated by the fact that many of these environmentally sensitive lands in the Tahoe Basin are in private ownership. California and Nevada therefore entered into (and Congress ratified) the 1980 Tahoe Regional Planning Compact to provide a regulatory counterpart to taxpayer-funded public works and acquisition programs of the type described above. The Compact requires that TRPA develop a regional plan which "shall provide for attaining and maintaining federal, state, or local air and water quality standards, whichever are strictest. . . . " (Pub.L. No. 96-551, 94 Stat. 3233 (1980).) TRPA has done so. It has developed a sophisticated land use plan which steers development away from extremely fragile lands and towards less sensitive lands which can be developed without polluting Lake Tahoe.

II.

UNDER WELL-SETTLED PRINCIPLES OF TAKINGS JURISPRUDENCE, THIS CASE MUST BE ANALYZED UNDER THE MULTI-FACTORED ANALYSIS IDENTIFIED BY THE COURT IN *PENN CENTRAL TRANSPORTATION CO. v. NEW YORK CITY*.

Petitioner and her amici insist that the result in this case is controlled by the Court's recent decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). That contention is manifestly incorrect.

In *Lucas*, the Court made two important clarifications to takings jurisprudence. First, in the "extraordinary circumstance" where government regulation has deprived a landowner of *all* economically viable use of the affected property, there is a presumption that a compensable taking has occurred. (505 U.S. at 1017-18.) Second, that presumption is properly overcome, and government regulation which totally eliminates economic use will be sustained, in at least two related circumstances: a) when the proposed use of private property contravenes traditional notions and limitations contained in state property law; and b) where government's refusal to permit the proposed use is necessary to forestall threats to the lives or property of others. (505 U.S. at 1027-1030.)

Lucas, however, is simply inapplicable to the present facts. That is because the relevant evidence in the record below demonstrates that the TDRs applicable and available to the subject property, even viewed in isolation from the parcel's worth attributable to other factors, provide substantial economic value. Accordingly, both *Lucas* and this Court's other regulatory takings decisions indicate that a very different analysis is compelled under the Takings Clause.

The appropriate constitutional standard in litigation such as the present case was instead provided by the Court in its landmark decision, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), a precedent

curiously overlooked by petitioner. *Penn Central* instructs that in the case of government regulation challenged under the Takings Clause which *reduces* but does not *eliminate* economic value, an "essentially ad hoc, factual inquir[y]" is required. (438 at 124.) Factors noted by this Court as being especially relevant to this ad hoc inquiry are: 1) the economic impact of the regulation on the property owner; 2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and 3) the character of the governmental action. (*Ibid.*)

As the Court reaffirmed in *Lucas*, the *Penn Central* analysis remains fully applicable to the vast majority of regulatory takings cases, in which *reduction* rather than *elimination* of economic value is involved. Such cases warrant the judiciary's indulging in the "usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage to everyone concerned.' " (*Lucas*, 505 U.S. at 1017-1018 (citing *Penn Central*, 438 U.S. 104, 124; and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).)

The Court's most recent regulatory takings precedents similarly reaffirm the continuing applicability of the *Penn Central* standard to the vast majority of takings cases (i.e., those dealing with "diminution" of use and value rather than the "total taking" found to exist in *Lucas*). (*Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 2316 n.6; *Concrete Pipe & Prod. v. Const. Laborers Pension Trust*, ___ U.S. ___, 113 S.Ct. 2264, 2290-2292 (1993).)

It is the amici's contention, however, that the TDR system put in place by TPRA preserves substantial value in petitioner's property and rights thereto. Therefore, under the Court's precedents, no taking has occurred under the Fifth Amendment.

III.

TRANSFER OF DEVELOPMENT RIGHTS (TDR) AND RELATED PROGRAMS ARE A WELL-RECOGNIZED ELEMENT OF MODERN LAND USE PLANNING, CALIFORNIA AND ELSEWHERE. SUCH PROGRAMS ARE A RELEVANT FACTOR IN GAUGING WHETHER A REGULATION EFFECTS A TAKING OF PRIVATE PROPERTY.

When an agency such as TRPA has been directed by federal and state law to plan for the conservation of a unique and priceless treasure such as Lake Tahoe, the legal mechanisms available to it are several. It may, relying on established background principles of state law of property and nuisance, prohibit such harmful action without compensation. (*Lucas, supra*, 505 U.S. at 1027-1030; *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 479, 488-491 (1987).) Alternatively, it may reject traditional "command and control" principles in favor of a different, market-oriented approach. In providing marketable development rights transferable to less sensitive lands in the Tahoe Basin, TRPA has taken the latter course. And that course has already been approved by this Court.

The last time the Court examined TDRs (in 1978), it held that "the [TDR] rights . . . undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." (*Penn Central, supra*, 438 U.S. at 137.)

This observation is fully consistent with the Court's emphasis in *Lucas* on the economic use of land. Economic reality makes value, rather than use on site, the appropriate test for a regulatory taking. As the Court noted in *Lucas*, 505 U.S. at 1017: " '[F]or what is the land but the profits thereof[?]' " (quoting 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)). Similarly, Justice Kennedy noted in his concurring opinion in *Lucas* the relevance to the

regulatory takings inquiry of "significant market value resale potential." (505 U.S. at 1033-1034 (Kennedy, J., concurring.))

A. TDR Measures of the Type Contained in TRPA's Regional Plan and Analogous Programs Are a Well-Established and Recognized Element of Land Use Planning by the State of California, Its Political Subdivisions, and Other Jurisdictions Throughout the United States.

1. The Nature and Function of TDR Programs Generally.

TDR programs have been used widely in California and elsewhere in the United States for more than a generation. TDR systems have been employed by many different levels and entities of government, including local, state, and – as in the case of TRPA – regional planning agencies. Such programs have been used to help protect a range of significant resources: scenic shoreline areas; fragile terrain at high risk from fire and flooding; zones of endangered vegetation; freshwater aquifers; important wetlands such as the Florida Everglades; agricultural lands; and buildings of major historic or cultural importance. (See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); see generally, Rick Pruetz, *Putting Transfer of Development Rights to Work in California*, Chaps. II and III (Solano Press 1993).)

The details of these various TDR programs vary widely, both in their rules and procedures, and in the roles which they play within the land-use planning process. Such programs do, however, share at least two underlying characteristics:

a) *TDR programs allow for more effective land-use planning*. When certain sites or parcels are not well suited for new development because of the likely impact of development on a sensitive resource, TDR programs provide a mechanism

for the planning body to protect that resource, while allowing and encouraging the use of the same increment of development on another site, where it will not undermine the objectives of a general or regional plan.

b) *TDR programs provide an important, additional option for landowners*. Since transferable development rights may be bought and sold, the rights will tend to flow to those locations where they will earn the highest economic return within the framework of local or regional planning guidelines. In some cases, the transfer of development rights may actually maximize the economic return to the transferor, if the transferor's expected increment of development is worth more at an eligible receiving site than it would be worth in place. For a given parcel of land, a transfer of development rights, at any given time, may or may not maximize economic return; as in the outright sale of land, the result depends on market conditions and other factors. But, whichever the case, TDRs unquestionably provide a landowner with a new and significant "avenue" to the marketplace, for the purpose of realizing the economic value of land. (Pruetz, *supra*; David Callies, *Preserving Paradise: Why Regulation Won't Work*, pp. 96-98 (U. Hawaii Press 1994); Joseph DiMento (ed.), *Wipeouts and Their Mitigation: The Changing Context for Land Use and Environmental Law*, pp. 67-81 (Lincoln Inst. of Land Policy 1990); *cf.* Sohn and Cohen, "From Smokestacks to Species: Extending the Tradable Permit Approach From Air Pollution to Habitat Conservation," 15 Stanford Environmental L.J. 405 (1996).) The existence of land use options such as those reflected in TDR systems, as an incident to the ownership of land, is appropriately taken into account when the

impact of regulation on the land is being considered.

2. The TDR Program at Lake Tahoe, and California's Role in Implementing It.

Under the Regional Plan adopted by the TRPA in 1987, several different types of TDRs have been recognized at Lake Tahoe. Among them are: ground coverage rights; residential building allocations; residential development rights; commercial floor area rights; and tourist accommodation units. (TRPA Code of Ordinances, Ch. 20.) Each of these transferable rights is a mechanism for stabilizing one element of growth within the Tahoe Basin, so as to assure that the development which does occur will not exceed regional carrying capacities, or prevent the attainment of the "environmental thresholds" set forth in the bistate Compact. The transferable rights are credited to parcels of land based on the presence of structures or other development which is eligible to be retired, or the potential for future development under current TRPA ordinances. Any transferable right may be used by the landowner who is credited with it on another parcel which is eligible to receive an additional increment of development; or may be sold to another party for use on any eligible receiver parcel. Many transferable rights have in fact been sold between private parties in this fashion at Lake Tahoe, sometimes by individuals dealing with each other at arms' length, in other instances through brokers or other intermediaries.

The California Tahoe Conservancy (Conservancy), a land conservation agency of the State of California active on the California side of the Tahoe Basin (Cal. Govt. Code § 66905 et seq.), operates a Land Coverage and Marketable Rights "bank." That bank complements the TDR programs of the TRPA. Through the bank, the Conservancy buys parcels of land which are of high priority for restoration or protection, and which have been credited with ground coverage and other transferable development

rights by TRPA. The Conservancy then sells transferable development rights from the acquired parcels to members of the public and other users, both public and private. These sales are made at publicly-announced prices, set by appraisal or other valuation study, or at public auction. The acreage from which the rights have been drawn is permanently retired, i.e., withdrawn from the pool of developable parcels. When it is required under TRPA guidelines, the Conservancy physically restores the land.

The Conservancy's bank assists the operation of TRPA's TDR programs, and advances the resource protection goals of TRPA's Regional Plan, by assuring that there is an active market for TDRs within the Tahoe Basin. The Conservancy program also helps landowners whose projects are otherwise consistent with TRPA and local ordinances to meet permit conditions and requirements. The Conservancy assists the private market, not only by acting as a source of supply through its public sales of coverage, commercial floor area, and other rights; but also by carrying out these sales at publicly announced prices, which provides a market benchmark for landowners who contemplate purchasing or selling such rights in their own, private transactions. The overall result has been to facilitate a large and varied marketplace for transferable rights.

In the nearly 10 years that the Conservancy "bank" has been operating, the Conservancy has provided 73,106 square feet of transferable ground coverage rights for private projects, in 210 separate transactions; and over 1,800 square feet of commercial floor area rights for commercial projects. An additional 13 coverage transactions have been completed between the Conservancy and public agencies, involving a total of 41,012 square feet of coverage rights. While the Conservancy is a large-scale seller of coverage, it by no means monopolizes the market for these rights; a large number of coverage transactions have also occurred in the private market. For TDRs

other than coverage rights, there is an active private market in place which is the main source of supply.

3. Other TDR Programs Operated By the State of California and its Political Subdivisions.

In California, other state and local agencies have similarly made use of transfer of development rights over the past 20 years. At the state level, the California Coastal Commission has for many years overseen a "transferable development credit" (TDC) program in portions of the Los Angeles County coastal zone, encompassing Malibu and part of the Santa Monica Mountains. The Commission instituted this TDC program as a means of addressing the cumulative impact of new residential units and land divisions within the coastal zone.

Under the TDC program, permit applicants in the designated receiver areas, located nearest to roads and other infrastructure, have been able to obtain development approvals on the condition that they obtain TDCs. The TDC procedure results in the permanent retirement of existing but as-yet-undeveloped lots in nearby mountainous areas. At the same time, the availability of an immediate economic return has provided a strong incentive for many lot owners in the sending areas to relinquish their development rights.

Since its formal adoption in 1979, the Commission's TDC program has resulted in the permanent retirement of well in excess of *500* parcels, making it one of the most active TDR programs in the nation. The Coastal Commission program has been supported, over many years, by the California Coastal Conservancy, another state agency which operated a TDC bank similar in concept to the Tahoe Conservancy program described above. (Pruetz, *supra*, pp. 53-55.) A California appellate court recently characterized the Santa Monica Mountains/Malibu TDC programs as "a well-established mechanism by which the Commission, as well as other local governmental entities, attempts to balance a private property owner's ability to

obtain development permits with the state's interest in protecting natural resources from unbridled development." (*Ojavan Investors, Inc. v. California Coastal Commission*, 26 Cal.App.4th 516, 520-521, n. 3, ___ Cal.Rptr.2d ___, ___, n.3 (1994) (citing numerous prior federal and state court decisions on the legal efficacy of TDR programs).)

A similar program is in place which protects one of our nation's most scenic routes – Highway One along California's coast. All areas visible from Highway One and its major public viewing areas are defined in Monterey County's local coastal plan as the Big Sur Critical Viewshed. No development whatsoever is allowed with the Critical Viewshed. (Critical Viewshed Ordinance, Big Sur Coast Land Use Plan, §§ 3.2.1, 3.2.2, 3.2.3 (November 5, 1985).) Through innovative transferable development programs by state and local governments, owners of buildable lots within the Critical Viewshed can qualify their property and receive development credits that can be used anywhere else in the County. (Transfer of Development Credits Ordinance, Monterey County Coastal Implementation Plan, Title 20, Ch. 20.156 (January 5, 1988).)

A key point, however, is that most TDR programs in California and elsewhere are operating at the *local* government level. One planning expert recently surveyed California's local jurisdictions and determined that over two dozen different TDR programs have been developed in the 1980's and 90's and are currently in effect. (Pruetz, *Putting Transfer of Development Rights to Work in California*, *supra*, at pp. 41-82.) This wide array of TDR programs allow California's local communities to achieve a variety of land use goals (including preservation of natural areas, hillsides, historic landmarks and agricultural land, as well as promoting new housing and redevelopment). They simultaneously preserve landowner profits, make local regulatory programs more flexible and generally

promote "win-win" solutions for the private and public sectors alike. (*Ibid.*)[3]

TDR and TDC programs enable state and local governments in California to shape development patterns in a manner not possible through traditional, prescriptive regulatory formulas. By introducing market incentives to the process of land use regulation, private landowners gain greater flexibility and economic value. Simultaneously, community goals such as avoiding nuisance-type land use conflicts and furthering key natural resource objectives are advanced. In communities throughout California, TDR-type programs have created opportunities for exchanges between private parties that have maximized the common welfare and eliminated issues of economic conflict.

4. The State of California Has Developed A Number of Analogous, Market-Oriented Initiatives. These Systems, Like TDR Programs, Foster Flexible, Non-Prescriptive Methods Which In Turn Both Promote Public Objectives and Private Economic Opportunities.

In recent years California has developed a number of market-oriented resource initiatives analogous to TDR programs and which are designed to promote similar public/private partnerships. California is concerned that a broad decision by this Court casting doubt on the

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[3] This is not to suggest that TDR programs are unique to California. To the contrary, such programs operate across the nation. Prominent examples of successful TDR programs operating in other states include: New York City's historic landmarks preservation ordinance; Collier County, Florida's program to preserve open space and ecologically sensitive coastal areas; and the New Jersey Pinelands TDR program, designed to preserve significant environmental and agricultural areas within a wetlands and forest preserve located in that state. See Pruetz, *supra*, at pp. 29-39.

constitutional efficacy of TRPA's TDR program could undercut these other state resource initiatives.

Some of the more significant such programs currently administered by California include the following:

– *California's Natural Communities Conservation Planning (NCCP) Program.* The NCCP program is designed to promote a more proactive, less intrusive, and more market-oriented approach to traditional command and control species preservation. (See Calif. Fish & Game Code § 2800 et seq.) California's widely-praised NCCP initiative is predicated on the concept of facilitating development in certain areas in exchange for preserving other undeveloped properties as species habitat. (See, e.g., New York Times, February 27, 1996; Chicago Tribune, June 11, 1995; Los Angeles Times, April 17, 1996.)

– *Conservation Banks.* Presently in California, there are in existence or in the process of being created 39 conservation banks composed of thousands of acres of wildlife habitat – land worth at least $40 million – in 12 California counties. These include three conservation banks in Northern California, ten in Central California and 26 in Southern California. One prominent example is ARCO's award-winning, 6,000 acre Coles Levee Ecosystem Reserve in Kern County. (1994 Innovations in State and Local Government Award Winner: Granted by the Ford Foundation and the John F. Kennedy School of Government, Harvard University; see Fresno Bee, September 17, 1994.) There a division of ARCO is facilitating its continuing oil and gas operations by selling credits to other landowners in the Southern San Joaquin County, and helping to implement the Metropolitan Bakersfield Habitat Conservation Plan. In turn,

Kern County is using (and other local governments are designing) TDR programs in support of their local habitat preservation efforts where actual habitat values are assigned parcels and then sold as development rights. (See Draft Kern County Valley Floor Habitat Conservation Plan Program (Alternatives Subcommittee Report, April 14, 1994); Implementation/Management Agreement by and among the U.S. Fish and Wildlife Service, California Department of Fish and Game, City of Bakersfield and County of Kern (August 15, 1994); Kern County Ordinance No. G-5998 (August 9, 1993); for a general overview of California's conservation banking initiatives and related measures, see *Innovative Tools for Natural Resource Management* (California Resources Agency and California Department of Fish and Game, June 1996).)[4]

– *Wetlands Mitigation Banking Programs.* An example of these programs is the wetlands mitigation banking program administered by California's Department of Fish and Game in the Sacramento-San Joaquin Valley. (See Calif. Fish & Game Code § 1775 et seq.) This state legislation encourages partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration. Such wetlands

[4] Conservation banking is not only for wealthy oil company landowners. In San Diego County, the Boys and Girls Clubs of East County Foundation are helping to finance their continuing programs for area youth by creating the two-phase San Vicente Conservation Bank on a 1,500-acre former cattle ranch. In western Placer County, a private entrepreneur has created Wildlands, Inc., a 315-acre preserve of wetland and riparian habitat funded by the sale of credits for the mitigation of Sacramento area development projects.

mitigation banking programs have been a central tenet of California Governor Pete Wilson's California Wetlands Conservation Policy (August 23, 1993).

– *Water Banking, Transfer and Marketing Programs.* California has recently adopted pioneering initiatives relating to waterbanking, transfer and marketing. The general objective of these programs is to promote more efficient use of California's finite water supplies and more regulatory flexibility for California's water rights system. (See, e.g., Calif. Water Code § 470 et seq. (Water Transfer Act of 1986).) Among the vital elements of the Wilson Administration's current waterpolicy are water marketing and transfers. California's State Water Bank, for example, has demonstrated the value of water transfers since the bank's initiation in 1991, when 800,000 acre feet were marketed. Following its successful first two pilot years, the bank was made a permanent feature of California's water supply system. As recently as 1995, over 200,000 acre feet of water were transferred from willing sellers to willing buyers to help alleviate the impact of the record drought conditions.

Important regulatory reform efforts such as those summarized above provide value in uses other than development of specific property. For example, land conservation banks provide a mechanism that assigns a monetary value to habitat, which in turn allows a landowner to obtain a financial return for conserving rather than developing his or her land. This in turn allows the private and public sectors to harness market forces to improve significantly upon traditional command and control methods of protecting and restoring wildlife habitat.

TDRs, pollution credits, conservation and mitigation banking are emerging as sophisticated resource management tools built on several foundations. In contrast, project-by-project mitigation of adverse environmental effects often involves lengthy regulatory processes and significant costs for private landowners seeking project approvals. The above-described regulatory reform initiatives greatly ease such burdens, often reducing compliance with environmental requirements to a single transaction. They additionally give landowners the certainty of having complied with legally-mandated mitigation requirements. Most importantly, these tools often allow landowners to recoup a higher value for their land than would otherwise be possible. (See below.) The availability of credits (whether termed development, conservation, habitat or pollution) makes the protection of habitat or wetland an economic asset that can be bought or sold by any third party.

B. Regulatory Systems Such as TRPA's TDR Program Confer Economic Value on Private Property. Accordingly, Such Programs Are Fully Relevant to the Constitutional Question of Whether Private Property Has Been Unconstitutionally "Taken" Under the Fifth Amendment.

A feature common to many of the market-oriented programs identified above is the fact that they provide economic value to affected private property interests. That is especially true with respect to TRPA's TDR program, both generally and as applied to petitioner's parcel. The factual evidence cited by the courts below underscores the point.

Accordingly, such programs – and, specifically, their economic impact on the affected property – are fully relevant to the "ad hoc, factual inquiry" mandated by *Penn Central* and this Court's related regulatory takings decisions. Ignoring their direct bearing on the takings

inquiry, as petitioner and her amici urge the Court to do, would flatly contravene those established precedents.

C. The Court Should Not, Through the Extreme Interpretation of the Takings Clause Advanced by Petitioner, Undermine the Important Advances Exemplified by TRPA's TDR Program. State and Local Governments Should Instead Be Encouraged to Continue to Develop Such "Win-Win" Regulatory Solutions.

Less intrusive and more market-oriented regulatory systems such as the TDR program developed by TRPA have many salutary features, as noted above. Given the expanded opportunities they afford private and public sectors alike, such programs constitute sound public policy. It would therefore be especially unfortunate if an unsupported and extreme construction of the Takings Clause were allowed to undermine those programs. Yet that is precisely the result advocated by petitioner and her amici in this case.

As noted above, the vast majority of such non-traditional forms of resource management and regulation are being formulated at the *state* and *local* government level. That is not surprising. As Justice Brandeis sagely noted over a half century ago:

> "There must be power in the States and the Nation to remold, through experimentation, our economic practices and institutions to meet changing social and economic needs.
>
> . . . .
>
> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. *It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . .* " (*New State Ice Co. v. Liebmann*, 285

U.S. 262, 311 (1932) (Brandeis, J., dissenting) (emphasis added).)

The critical, federalism-based themes advanced by Justice Brandeis in 1932 apply with equal force today.

Justice Kennedy identified a related concern in his concurring opinion in *Lucas*, one dealing directly with regulatory takings principles. There Justice Kennedy opined on "the exercise of regulatory power in a complex and interdependent society." (505 U.S. at 1035 (Kennedy, J., concurring.)) Focusing on the proper scope of the police power in the face of newfound resource demands, he observed: "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source." (*Ibid.*)

That states such as California have the power and responsibility to evolve their respective laws governing real property within their jurisdictions is apparent from a consistent line of Supreme Court precedents. (See, e.g., *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977) ("Whether as rules of property, it would now be safe to change these doctrines . . . is for the several States themselves to determine"); *Lucas, supra*, 505 U.S. at 1017, n.7.)

Petitioner contends that programs such as TRPA's TDR system are simply irrelevant to the constitutional inquiry before this Court. That argument is legally insupportable, for the reasons set forth above. Additionally, however, acceptance of petitioner's theory would seriously compromise important regulatory programs such as TRPA's, in favor of the more traditional "command and control" systems that afford private and public interests alike with fewer options and opportunities. (See generally, "Law and Economics Symposium: New Directions in Environmental Policy," 13 Columbia J. of Env. Law 153 (1988); Joseph DiMento (ed.), *Wipeouts and Their*

Mitigation: The Changing Context for Land Use and Environmental Law (Lincoln Inst. of Land Policy 1990).) This Court should not countenance such a result.

IV.

ASSESSMENT IN THIS CASE OF THE "CHARACTER OF TRPA'S REGULATORY ACTION" AND PETITIONER'S "REASONABLE INVESTMENT-BACKED EXPECTATIONS" FURTHER CONFIRMS THAT NO COMPENSABLE TAKING CAN BE DEMONSTRATED IN THIS CASE.

The economic impact of TRPA's regulatory program and the means of assessing that impact have been a central focus of this litigation. California has addressed those points above, and they have been thoroughly analyzed by the parties and other amici.

Nevertheless, reference to the two other specific criteria identified by the Court in *Penn Central* as relevant to the regulatory takings inquiry further demonstrate the lack of merit to petitioner's legal claim. It is to those standards that California now briefly turns.

A. Under Longstanding California Property Law, Private Landowners Possess No Right to Pollute Publicly-Owned Waterways Such as Lake Tahoe.

California has previously described how the disturbance of environmentally-fragile lots in the Lake Tahoe Basin produces a scientifically-documented, causal and deleterious effect on the lake's water quality. The potential development of the petitioner's lot and the cumulative impacts of developing similarly-situated parcels would seriously impair water quality. It is for that reason that TRPA, along with other state and federal officials, have taken steps to restrict such development.

The authority to take police power measures of this type to forestall water pollution is a longstanding principle of California property law. The landmark California

case on this point is the century-old decision in *People v. Truckee Lumber Co.*, 116 Cal. 397, 48 P. 394 (1897). There the California Supreme Court upheld an injunction, on public nuisance grounds, barring the continued operation of a private sawmill that polluted the Truckee River.

The same principle was at the heart of California's first major environmental battle – the fight by California farmers and urban dwellers to halt the downstream flooding and destruction triggered by hydraulic mining in the Sierra Nevadas. In *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 4 P. 1152 (1884), the California Supreme Court sustained a permanent injunction against a hydraulic mining company whose extractive activities had triggered this widespread pollution. A federal court came to the identical conclusion in the same year, in a similar factual setting. (*Woodruff v. North Bloomfield Gravel Mining Co.*, 18 F. 753 (1884); for a general account of the legal and political battles over hydraulic mining in nineteenth century California, see Kelley, *Gold v. Grain* (1959).)

The essential point is that it is a well-settled and longstanding principle of California property and nuisance law that private parties such as petitioner have no right under California law to utilize their upland property in a manner which pollutes public waterways. Accordingly, private property owners in the Tahoe Basin simply have no reasonable, investment-backed expectation that they are free under the U.S. Constitution to do so. (*Lucas, supra; Penn Central, supra,* 438 U.S. at 124.)

B. Even Long-Accepted Use of Private Property Can Be Proscribed Through Government Regulation When Scientific Advances, Newly-Obtained Knowledge and the Like Demonstrate the Nuisance-Like Nature of Such Private Conduct.

Petitioner nonetheless maintains that her desire to build a private residence on her upland parcel represents a traditional,well-established land use that perforce cannot be proscribed consistent with constitutional principles. Again, petitioner is mistaken, especially given the unique circumstances of the present case.

First, land uses which are fully proper in one context can be absolutely inappropriate in another. As this Court so aptly noted in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "A nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard."

Such is the case here. Residential development which is to be permitted and even fostered in certain circumstances can and must be precluded in others. One example suggested by the Court's *Lucas* decision aptly demonstrates the latter situation: a private structure proposed to be built astride an earthquake fault. Construction of a private residence in a location that will pollute or obstruct adjacent, publicly-owned waterways, as in this case, is another.

Second, California's legal history is replete with examples of state property law being invoked to preclude private activities previously considered to be reasonable and appropriate land uses. The above-described state and federal court decisions in *People v. Gold Run Ditch & Mining Co.* and *Woodruff*, respectively, spelled the end of the gold mining industry – an activity that had previously formed the centerpiece of California's economy. (See generally, *Gold v. Grain, supra.*) Similarly, 100 years ago the California Supreme Court enjoined otherwise legal timbering operations when the destructive effects of that activity in a particular location became apparent.

Finally, it is not dispositive that the causal relationship between development on stream environment zones in the Tahoe Basin and the pollution of Lake Tahoe only became known relatively recently. In retrospect, it certainly would have been preferable if the scientific knowledge demonstrating that linkage had been discerned before *any* development had occurred in stream environment zone. The fact that it was not, however, cannot compel regulators to compound the problem by allowing the same, deleterious acts to be repeated over and over again. As this Court noted in *Lucas, supra,* "changed circumstances or new knowledge may make what was previously permissible no longer so." (505 U.S. at 1031 (citing the Restatement (Second) of Torts); see also, *id.* at 1035 (Kennedy, J., concurring).) And the quotation employed a half century ago by Justice Rutledge in *Wolf v. Colorado*, 338 U.S. 25, 47 (1949) remains apt: " 'Wisdom too often never comes, and so one ought not to reject it merely becomes it comes late.' "

C. Government Has Relatively Broad Authority Under the Takings Clause to Protect Unique Public Resources Such as Lake Tahoe From Injury or Destruction.

A final, necessary factor that must be considered under *Penn Central* is the character of the governmental action being challenged under the Takings Clause. (*Keystone, supra,* 480 U.S. 470, 488-493.) In this instance, both the nature of the environmental threat TRPA is confronting and the unique character of the public resource being protected tip the constitutional inquiry heavily in TRPA's favor. Government has relatively greater authority under the Takings Clause to regulate under the police power to address threats to unique and irreplaceable public resources than is the case with respect to more commonplace types of property. (See, e.g., *Lucas, supra,* 505 U.S. at 1035) (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system

that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit"); *Hunziker v. State of Iowa*, 519 N.W.2d 367 (Iowa 1994) (state restriction on development of privately-owned Indian burial site held valid; no right under Takings Clause to develop such property under long-standing principles of state law); *cf. Associated Home Builders v. City of Livermore*, 18 Cal.3d 582, 617, 135 Cal.Rptr. 41, 61, 557 P.2d 473, ___ (1976) (Mosk, J., dissenting) ("Limitations on growth may be justified in resort communities, beach and lake and mountain sites, and other rural and recreational areas; such restrictions are generally designed to preserve nature's environment for the benefit of all mankind. They fulfill our fiduciary obligation to posterity. As Thomas Jefferson wrote, the earth belongs to the living, but in usufruct").)

It is perhaps stating the obvious that Lake Tahoe constitutes the prototypical public asset which allows – indeed, demands – heightened efforts to protect the lake's unique and imperiled resources. The Takings Clause presents no constitutional bar to such salutary efforts by TRPA and others.[5]

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[5] For the above stated reasons, TRPA's restrictions on the subject property would pass constitutional muster under the "state property/nuisance law exception" to the "total takings" presumption, as articulated by the Court in *Lucas*. Inasmuch as the same result obtains under the distinct (and far more relevant) *Penn Central* multifactored analysis, however, it is unnecessary for the Court to address the constitutionality of the TRPA regulations under the *Lucas* standard.

CONCLUSION

As to the issues discussed herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

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Respectfully submitted,

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